LIBRARY
SUPREME COURT, U. S.
FILED
NOV 19 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 871.

DAY-GLO COLOR CORP.
(formerly SWITZER BROTHERS, INC.),
ROBERT C. SWITZER
and
JOSEPH L. SWITZER,

Petitioners,

vs.

HARRY P. LOCKLIN and ELMER J. BRANT,
dba RADIANT COLOR COMPANY,

Respondents.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

REPLY IN SUPPORT OF CERTIORARI.

THOMAS V. KOVIKA,
ARTER & HADDEN,
1144 Union Commerce Building,
Cleveland, Ohio 44115,

SAMUEL W. KIPNIS,
120 South LaSalle Street,
Chicago, Illinois 60603,

THOMAS J. GRAY,
4732 St. Clair Avenue,
Cleveland, Ohio 44103,

Attorneys for Day-Glo Color Corp., Robert C. Switzer and Joseph L. Switzer, Petitioners.

November 17, 1970.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0347

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 871.

DAY-GLO COLOR CORP.
(formerly SWITZER BROTHERS, INC.),
ROBERT C. SWITZER
and
JOSEPH L. SWITZER,

Petitioners,

vs.

HARRY P. LOCKLIN and ELMER J. BRANT,
dba RADIANT COLOR COMPANY,

Respondents.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY IN SUPPORT OF CERTIORARI.

Assertions by Radiant—in the hope of escaping review—that the questions presented have been ruled on by the master, the District Court, and the Court of Appeals do not dilute their importance. The very circumstance that they *have been so ruled* gives the questions their compelling importance. They put the antitrust law in turmoil.

It will not do for Radiant (page 2 of Radiant's brief), to divert attention by modifying *Question 1* (whether erroneous damage standards have been applied) and

Question 3 (whether attorney's fees have been improperly as well as extravagantly awarded), by suggesting that they turn on "the record taken as a whole."

These questions *arise on the findings* made by the master, which were adopted *in toto* by the Court of Appeals. The master made clear by his findings *what he took into account and why he decided as he did*—doubtless for the very purpose of permitting easy correction if it should turn out that he was in error in the law he applied.

Nor will it do for Radiant (page 2), to change *Question 4* (concerning the effect of the *settlement* with Sherwin-Williams), to suggest this question concerns the effect of "a *dismissal* [by Radiant of its suit against Sherwin-Williams] without prejudice." It was not a mere dismissal; *it was a settlement*, as indeed Radiant correctly concedes (on page 6) in stating that the problem concerns "the effect of the Sherwin-Williams settlement." But Radiant is in error in suggesting (page 6) "The Court of Appeals found the facts otherwise * * *." The Court of Appeals accepted, here as elsewhere, every finding made by the master. The point is that from these findings no conclusion can follow but that there was *a settlement with Sherwin-Williams*, thus posing the question: Does the settlement have the *same* legal effect in an antitrust case as it would have in any other tort action?

Question 2 (whether the "clearly erroneous" rule has been misconstrued), and *Question 5* (whether antitrust damages must, willy-nilly, regardless of circumstances, be trebled), Radiant concedes (page 2) are correctly stated. They are questions of obvious importance.

These, as well as the other questions, equally have importance far beyond the confines of this single case, as will be apparent upon considering:

1. Damages have been imposed in disregard of findings. The irony is that Judge Miner *refused to find* that antitrust damages to Radiant's business commenced *January 1, 1949*, and adjudged instead that such damages *commenced in 1952 and 1953*. Despite this, damages now are awarded *"commencing January 1, 1949."*

Thus is undone Judge Miner's specific rejection of Radiant's specific request to find damages commenced January 1, 1949. The rejection of that finding Radiant did not assign in the cross-appeal it took in the earlier proceedings.

The result of such disregard of Judge Miner's findings is:

(a) *To waste the eight years of litigation* that went to bring these findings to finality. These issues were fought to the very door of this Court (from February 19, 1954, when Radiant filed its antitrust claim, to April 16, 1962, when this Court denied certiorari, 369 U.S. 851).

(b) *To add $226,992 to the already immense judgment* laid on a small business for a trespass every court that has examined the case has certified was the result of good faith conduct believed to be lawful.

(c) *To undermine all findings* in all litigation.

Why make findings in any case if, as here, they are to serve no purpose in limiting subsequent proceedings in the case?

Findings surely are intended not only to aid review, but to serve the purposes of *res judicata*, as well as to limit subsequent proceedings in the same case.

These purposes, under the decision below, are destroyed.

2. The findings make clear that damages have been awarded for losses not caused by antitrust violation. The master has certified his award *includes* damages for Radiant's own "production and sales problems." (MR p. 140, ¶ 10.)

Worse.

The award treats as antitrust damages, goods *returned by customers because, as the master found, the merchandise was unsatisfactory.* (MR pp. 44-45, ¶ 43; MR p. 89, ¶ 108.) It includes an award of damages *on six categories of nonrelevant items.* (Appendix p. 16.)

In determining damages, each of these categories of improper items was ballooned *by multiplying factors,* thereby adding $275,328 to the judgment.

The result is the more appalling since the owners of the Radiant business "*thought that they weren't being hurt,*" as counsel admitted in explaining why he would not permit them to testify to the damage suffered. (R. 1430.)

For not "being hurt" they now are given $1,145,387.-73.

Reliance on the "estimates" made to serve as proof was, for Radiant, a work of necessity—and will be a revelation to antitrust claimants.

Public interest can hardly be lacking in such a state of affairs in the administration of the antitrust laws.

3. The "clearly erroneous" rule is misapplied where even mistakes in arithmetic are left uncorrected. If every determination were accepted—even to an allowance of antitrust damages for merchandise returned as unsatisfactory—and only mistakes in arithmetic corrected, the profit would be 15%, and not the 16% allowed, and the judgment $58,998 less.

CONCLUSION.

The debris to which the decision reduces the law of damages in antitrust cases should not go unreviewed.

The writ should issue.

Respectfully submitted,

THOMAS V. KOVIKKA,
ARTER & HADDEN,
1144 Union Commerce Building,
Cleveland, Ohio 44115,

SAMUEL W. KIPNIS,
120 South LaSalle Street,
Chicago, Illinois 60603,

THOMAS J. GRAY,
4732 St. Clair Avenue,
Cleveland, Ohio 44103,

Attorneys for Day-Glo Color Corp., Robert C. Switzer and Joseph L. Switzer, Petitioners.

November 17, 1970.